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DO NOT PUBLISH

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA**

In re:)	Bankr. No. 97-3-1545-BTC
)	Chapter 13
)	
RIMON M. SAWAYA and)	
HADIL QIRREH,)	
)	
Debtors.)	<u>MEMORANDUM RE PROCEEDS OF SALE OF REAL PROPERTY</u>
)	

Debtors filed a motion seeking a determination that they are entitled to keep the proceeds of the postpetition sale of certain real property. The chapter 13 trustee David Burchard (Trustee) filed a countermotion seeking a determination that the proceeds of sale must be used to pay off the chapter 13 plan. Melanie M. Darling appeared for Debtors. Adam N. Barasch appeared for Trustee. Upon due consideration, and for the reasons set forth below, I determine that Debtors are entitled to retain the proceeds.

FACTS

Debtors' confirmed chapter 13 plan provides that Debtors will pay Trustee \$875 per month for 60 months. The plan also provides

**MEMORANDUM RE PROCEEDS OF
SALE OF REAL PROPERTY**

1 that Debtors must sell real property at 847 Thornhill Drive, Colma,
2 California (the Property) by April 4, 1999, and pay all liens
3 against the Property from the proceeds of sale. After Debtors
4 defaulted in making monthly plan payments, the plan was modified to
5 suspend payments for several months and increase future payments
6 from \$875 per month to \$1,175 per month. When Debtors again failed
7 to make monthly payments and failed to sell the Property by the
8 sale deadline, Debtors moved to reduce payments to \$900 per month
9 and to extend the sale deadline. Trustee moved to dismiss the
10 case. Both motions were continued several times and were never
11 submitted to the court for decision. The Property was finally sold
12 on March 15, 2000. The net proceeds after payment of all liens
13 against the Property total \$27,792. Trustee contends that these
14 sale proceeds should be used to pay off the chapter 13 plan
15 immediately. Debtors contend that they are only required to bring
16 plan payments current and that they may keep the excess proceeds
17 and pay their remaining obligations over the remaining term of the
18 plan.

19 **DISCUSSION**

20 The principal question is whether the plan requires that the
21 proceeds from sale of the Property be used to pay all remaining
22 plan obligations, or only to pay off the liens against the
23 Property. The plan provides in relevant part "liens will remain to
24 847 Thornhill Dr. and that property will be sold no later than two
25 years from filing date and liens paid by proceeds as available."
26 Debtors argue that this language clearly provides that only the
27 liens against the Property need be paid from the proceeds of sale.

28 **MEMORANDUM RE PROCEEDS OF
SALE OF REAL PROPERTY**

1 Trustee argues that two circumstances suggest that this language be
2 interpreted to require that sale proceeds be used to pay off all
3 remaining plan obligations. Trustee first notes that he objected
4 to confirmation on the basis that the plan was not feasible,
5 because the plan originally contained no sale deadline and Debtors
6 would be unable to make all required payments without selling the
7 Property. Trustee next notes that Debtors have repeatedly failed
8 to make the payments specified in the plan and that it is unlikely
9 that Debtors will complete the plan unless the sale proceeds are
10 used to pay off the plan.

11 I find that the plain language of the plan requires Debtors to
12 pay only the liens against the Property from the proceeds of sale,
13 and that the circumstances cited by Trustee do not support a
14 contrary interpretation of the plan. At the time Trustee objected
15 to confirmation, the parties believed that the Property had no
16 value in excess of the liens against it. Thus, the Trustee's
17 objection does not suggest that the parties expected that sale
18 proceeds would be used to pay off any claims other than the liens
19 against the Property. That Debtors have repeatedly failed to make
20 plan payments since confirmation may be the basis for a motion to
21 modify the plan to require an immediate payoff, but it is not
22 relevant in determining the parties' intent at the time the plan
23 was confirmed, and Trustee's papers state expressly that he is not
24 seeking modification of the plan.

25 It is not clear whether Debtors still seek to modify the
26 current plan to reduce the plan payments from \$1,175 to \$900 per
27 month. To the extent they do so, the motion is denied. In

28 **MEMORANDUM RE PROCEEDS OF
SALE OF REAL PROPERTY**

1 obtaining substantial cash proceeds from the sale of the Property,
2 Debtors have an unexpected ability to pay off the plan earlier than
3 originally anticipated. It is undisputed that Debtors have
4 repeatedly failed to make the payments called for in their own
5 plan. By requesting that the plan be modified to reduce the
6 monthly payment while permitting them to retain the sale proceeds,
7 Debtors request that the existing terms of the plan be modified to
8 reflect their decreased ability to make monthly payments, but not
9 to reflect their increased ability to pay creditors through a lump-
10 sum payment. Debtors are not entitled to equitable relief because
11 they do not do equity themselves.

12 My comments at the hearing notwithstanding, I do not address
13 at this time whether Debtors' "zero percent" plan requires Debtors
14 to make payments to unsecured creditors to the extent the plan
15 payments called for in paragraph 1 of the plan exceed the amount
16 needed to pay secured and priority creditors. It is not clear that
17 issue is ripe, and the parties have not had an adequate opportunity
18 to brief the issue.

19 Debtors' motion for permission to use sale proceeds is
20 granted. Debtors' motion to modify the plan is denied. Trustee's
21 motion to compel payoff of the plan is denied. This order is
22 without prejudice to any future motion of Trustee to modify the
23 plan or to dismiss the case for failure to perform under the plan.

24

25

26 Dated: _____
27 Thomas E. Carlson
United States Bankruptcy Judge

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MEMORANDUM RE PROCEEDS OF
SALE OF REAL PROPERTY